STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Clarendon County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Lower Court Case Number: 2018-CP-14-00382

ANTHONY WOODS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RULE 243(c), SCACR STATEMENT

The PCR Court's dismissal of the PCR application as impermissibly successive and time-barred was improper and this appeal should be allowed to proceed. *See* Rule 243(c), SCACR.

I. PROCEDURAL HISTORY

Woods was convicted and sentenced to death in December 2006 for murder and sexual assault in Clarendon County. His convictions and sentence were affirmed on direct appeal by this on direct appeal. *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009). Despite being tried after the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding the Eighth Amendment bars the execution of persons with intellectual disability, and having evidence

indicating Woods is a person with intellectual disability, Woods's trial counsel did not raise and *Atkins* claim during the capital trial proceedings.[1]

In post-conviction proceedings, Woods was represented by attorneys Melissa Armstrong and Robert Kilgo who initially alleged an *Atkins* claim and retained Dr. David Price to examine Woods's intellectual functioning. Dr. Price administered the WAIS-IV and Woods obtained a full-scale IQ score of 72. Less than thirty days later, Woods was examined by the Department of Disabilities and Special Needs ("DDSN"). At DDSN, Woods was administered a Stanford Binet Intelligence Scales, 5th Edition and DDSN reported a full-scale IQ score of 81.[2] After receiving the DDSN report, and conducting no investigation into the validity of the DDSN IQ score, PCR counsel withdrew the *Atkins* claim. The PCR court denied Petitioner's non-*Atkins* PCR claims and this Court denied certiorari.

In federal habeas proceedings, based on multiple IQ scores in the intellectual disability range and evidence suggesting deficits in adaptive behavior, undersigned counsel undertook initial independent investigation and determined Woods is very likely a person with intellectual disability.[3] Woods, through counsel, timely filed a federal petition for writ of habeas corpus

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[1] At the time of Woods's capital trial in 2006, counsel were aware that examiners from the State Department of Mental Health had administered a WAIS-III IQ exam to Woods and he obtained a full-scale IQ score of 73. Woods's reading skills were measured at a third grade level. And yet, there is no evidence in the record or from undersigned counsel's investigation that trial counsel took the basic step of retaining or consulting with a mental health expert with expertise in intellectual disability.

[2] Dr. Gordon E. Brown, Jr., who authored and signed the DDSN report, did not administer an IQ test to Woods. Instead, Dr. Brown's report indicates that Thomas Kirby, who was "a contract psychologist with DDSN," administered the Stanford-Binet while Dr. Brown observed. Undersigned counsel's investigation has determined that Kirby is not a licensed psychologist.

[3] In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), this Court held that the State's definition of intellectual disability is found in the death penalty statute, which defines that condition as "significantly subaverage general intellectual functioning existing concurrently with

seeking relief based on claims alleging, *inter alia*, that Woods is a person with intellectual disability and his trial counsel provided ineffective assistance of counsel in failing to investigate, develop, and present evidence of his intellectual disability. On September 17, 2018, undersigned counsel filed a second-in-time PCR Application in the Clarendon County Court of Common Pleas in an effort to exhaust these claims in the South Carolina State courts. In Woods's second-in-time PCR proceedings, before Judge Culbertson, Woods alleged specific facts indicating he is a person with intellectual disability, including (1) declarations from four experts indicating they believe Woods is likely a person with intellectual disability,[4] (2) evidence the DDSN IQ score was not validly administered and is likely artificially inflated, and (3) evidence that Woods suffers from deficits in adaptive functioning such that he could not live independently and did not know how to obtain a job or public assistance.

The State moved to dismiss the proceedings as successive, time-barred, and barred by *res judicata*. Judge Culbertson dismissed the PCR application as successive and time-barred and denied Woods's motion to alter or amend in a Form 4 summary denial. He did not dispute the bona fides of any of Woods allegations or proof on the issue of whether Woods, in fact, is a person with intellectual disability.

The lower court was incorrect in finding Woods's PCR application impermissibly successive and time-barred and Woods requests this Court allow his appeal to proceed for the reasons stated below pursuant to Rule 243(c), SCACR.

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deficits in adaptive behavior and manifested during the developmental period." *Id.* at 278-79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)). IQ scores of approximately 75 or below are considered to be in the intellectual disability range of intellectual functioning. *See Atkins*, 536 U.S. at 309 n.5; *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014).

[4] Dr. Susan Knight's declaration stated: "[I]t is my opinion to a reasonable degree of psychological certainty that a prima facie case of intellectual disability is present."

II. ARGUMENT

The lower court's ruling improperly and unfairly leaves Woods as the only capital defendant in South Carolina to be denied a chance to litigate a claim of intellectual disability in the state courts. Four other PCR courts have recognized the risks of not providing judicial review to claims of intellectual disability in capital cases and found such claims constitute one of the exceptions to the general rule against allowing a successive PCR applications to proceed. *See Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (holding successive PCR applications generally should not be entertained "'unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.'") (quoting S.C. Code § 17-27-190)).

Under circumstances similar to the case here, PCR judges in *Elmore v. State*, No. 2005-CP-24-1205, *Stone v. State*, No. 2018-CP-43-01025, *Aleksey v. State*, 2015-CP-38-764, and *Bryant v. State*, 2016-CP-43-828, have allowed successive post-conviction relief proceedings in order to review claims of intellectual disability, despite the fact the claims technically could have been raised earlier. The Honorable J. Mark Hayes allowed Eddie Elmore to seek post-conviction relief, noting that "[b]oth the United States Supreme Court and the South Carolina Supreme Court desire a substantive review of the mental status of pre-*Atkins* death penalty sentenced inmate[s] claiming mental retardation [(intellectually disabled)]."[5] *See* Order Denying Motion to Dismiss, *Elmore v. State*, No. 2005-CP-24-1205, at 2 (June 18, 2007). Similarly, Judge Michael Nettles found in *Stone*, "*Atkins* represents a complete categorical bar on the execution of the intellectually disabled" and "[a]s such if Applicant is in fact intellectually disabled then he cannot be executed under any

[5] Ultimately, Judge Hayes considered the merits of Elmore's claim and found Elmore intellectually disabled; the State did not appeal Judge Hayes' order.

circumstances." Order, *Stone v. State*, No 2018-CP-43-01025, at 6 (Feb. 22, 2019). These four lower courts allowing successive PCR applications to proceed correctly found that the categorical ban on the death penalty for the intellectually disabled requires death sentenced inmates have one fair bite at the apple to show they are ineligible for the death penalty.[6] *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999). Thus treating Woods differently raises questions of both due process and equal protection concerns under both the United States and South Carolina Constitutions.

Denying Woods the opportunity to investigate and present evidence of intellectual disability is especially improper in this case because recent Supreme Court decisions have shed new light on the definition of intellectual disability and initial PCR counsel did not have the benefit of those cases in determining whether or not to pursue an *Atkins* claim. *See Moore v. Texas*, 137 S. Ct. 1039 (2017) (recognizing that courts and attorneys have incorrectly failed to properly assess intellectual disability due to entrenched stereotypes); *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (holding that the IQ cut-off for intellectual disability extends to 75 utilizing the standard error of measurement). However, even without the benefit of these recent cases, there is evidence showing

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[6] This Court has previously recognized several other exceptions to the general bar on successive PCR applications. *See, e.g.*, *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) (allowing a successive PCR application where the applicant alleges he was denied the state right to qualified counsel in his initial PCR proceedings); *Washington v. State*, 324 S.C. 232, 235-36, 478 S.E.2d 833, 834-35 (1996) (allowing a successive PCR application because of the ineffective assistance of initial PCR counsel and various other procedural irregularities); *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982) (finding that a "unique" combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding); *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel). In the case of intellectual disability, denying a PCR applicant the ability to present evidence that he is ineligible for the death penalty risks allowing the execution of a person constitutionally exempt from the death penalty. Such an unconstitutional execution would "amount to a gross miscarriage of justice" and thus must constitute one of the "rarest exceptions" to allow a successive PCR application to proceed. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

that initial post-conviction counsel were ineffective in failing to pursue Woods's claim of intellectual disability. To ensure Woods has one full and fair opportunity for a judicial determination of his intellectual disability, he must be allowed to proceed with a successive PCR application.[7]

CONCLUSION

For all of the reasons stated above, this Court should permit Petitioner to file a petition for writ of certiorari and allow his appeal to proceed.

Respectfully submitted,

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[7] The lower court additionally, improperly found Woods's successive PCR application was time-barred, but this Court has never applied the one-year statute of limitations to successive PCR applications permitted to proceed under one or more exceptions. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple."); *see also Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). This Court's policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR application. The lower court also did not address Woods's arguments that, even if his application is time-barred, it is well within the Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009); *Moses v. State*, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017).